

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 50 of 1992****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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BHIKHUBHAI VASTABHAI - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

NOTICE UNSERVED for Appellant(s) : 1, MR YOGESH S LAKHANI WITH
MR.SAIYED, LD. ADVOCATE for Appellant,
MR.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**Date : 10/07/2007****ORAL JUDGMENT**

The appellant-original accused No.1 of Sessions
Case No.1 of 1987 has preferred this appeal against

the judgment and order of conviction and sentence dated 13th January, 1992 recorded by the learned Additional Sessions Judge, Amreli for the offence punishable under Section 326 of the Indian Penal Code whereby the appellant has been directed to undergo rigorous imprisonment for five years and to pay a fine of Rs.2,000/-, in default of making payment of amount of fine, to undergo rigorous imprisonment of one year.

2. The appellant has expressed his grievance against the judgment and order under challenge by indicating various grounds which are mentioned in paragraph 3 of the memo of appeal. Mr.Lakhani, learned Counsel appearing with Mr.S.S.Saiyad, for the appellant has taken me through all the relevant grounds of challenge and also the evidence led by prosecution during the course of trial.

3. On the strength of one complaint registered by Bagasara Police Station being Crime Register No.I-51 of 1986, the Police had investigated the crime for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code and under Section 135 of the Bombay Police Act against the two accused

persons, viz., the present appellant, Bhikhubhai Vastabhai and one Devkubhai Lakhabhai. After the investigation, both the accused were charge-sheeted and on completion of the trial, the Court acquitted the original accused No.2-Devkubhai Lakhabhai from the charge levelled against him. However, the learned trial Judge has held that present appellant-original accused No.1 guilty for offence punishable under Section 326 of the Indian Penal Code but not under Section 307 of the Indian Penal Code, as charged.

4. While assisting the Court, learned Advocate for the appellant and learned A.P.P., for the respondent-State has taken this Court through the judgment and order under challenge and the relevant features which ultimately led the Court to a finding that prosecution has established the charge of offence punishable under Section 326 of the Indian Penal Code beyond reasonable doubt.

5.1 To prove the charge the prosecution has examined 14 witnesses referred to in paragraph 3 of the impugned judgment and order. Out of 14 witnesses, two witnesses are doctor, examined vide Exh.18 and 21 respectively and three witnesses were Panchas who

have tendered their evidence at Exhs.26, 28 and 29 in the various Panchnamas drawn. One Executive Magistrate, Ishwarlal Hiralal Shukla was also examined at Exh.31 to prove dying declaration that was recorded when the injured witness, Goganbhai Rambhai was under treatment and his condition was found serious by the doctors who were treating him on account of blood loss. Three important witnesses, Ramnikbhai Kanjibhai, examined at Exh.11, Nagjibhai Bhathabhai, examined at Exh.12 and Janakbhai Ratilal, examined at Exh.17 were cited as witnesses as if they were the eye-witnesses to the incident. However, none of these three witnesses have supported the case of prosecution and these witnesses were declared hostile. The case of the prosecution was mainly resting on the crucial evidence of the complainant, Balabhai Parshottambhai, examined at Exh.7. According to prosecution the complainant was present at the time when the victim was assaulted by accused persons and some other persons were present, who had shifted the injured-Gogan to Bagasara Hospital. But the complainant has not supported the prosecution and was declared hostile.

5.2 The learned trial Judge has recorded the

conviction on the strength of the evidence led by prosecution viz., the Prosecution Witness No.2, Gogan Rambhai (Exh.9) and his brother, Prosecution Witness No.3, Shambhubhai Rambhai (Exh.10). The learned trial Judge has also considered the facts emerging from the Panchnama drawn in presence of Panchas by the Investigating Officer, Prosecution Witness No.14, Harjibhai Parshottambhai Nandasan examined at Exh.34. One Panch Witness, Savjibhai Raghavbhai who examined at Exh.26 has materially supported the prosecution case. This witness has proved the collection of blood, etc., from the place of incident and has stated that spot of the incident i.e., place of actual assault was shown to Panch Witnesses by the complainant.

6. It is not a matter of dispute that the complaint was lodged by the complainant, because the complainant has identified his signature on the original complaint shown to him and on the strength of the very complaint, the offence was registered at about 12:30 p.m., on 25/09/1986 by Bagasara Police Station. It is the say of P.S.I., Shri Nadasan, who recorded the complaint and ultimately investigated the crime, that he recorded the complaint of the

complainant at Bagasara Hospital. Therefore, presence of complainant at Bagasara Hospital is not under any serious dispute. Both the doctors have narrated the details of injuries noticed by them when the injured witness was brought before them after the assault, firstly at Bagasara and then at Amreli Hospital.

7. It is in evidence that after assault, injured witness-Gogan was taken to Bagasara Hospital immediately and at that time Dr.Selarbhai Golanbhai Kamalia, Medical Officer on duty examined and treated the injured. During the treatment, all the while, the injured was on the stretcher and immediately thereafter he was referred to the Hospital at Amreli, a bigger and better hospital in the district headquarter where Dr.Yasmin Kaba (Exh.21), Medical Officer had examined the injured-Gogan and treated him. It is in evidence of Dr.Yasmin Kaba that as it was necessary to shift the patient to Ahmedabad for further better treatment and diagnosis, she referred the patient to Ahmedabad after treating him.

8. It is not necessary to reproduce the facts narrated by the witnesses who examined by prosecution. However, the Court can consider the

relevant parts of the evidence pointed out by Mr.Saiyad as well as by Mr.Bhate, learned A.P.P., while appreciating their submissions and to appreciate the rival side contentions placed before the Court, it would be beneficially to state the basic story of prosecution. The gist of the prosecution case is reflected in the charge framed at Exh.2 and it would be sufficient to reproduce the relevant part of the charge framed by the learned trial Court. The appellant was asked to face, of course, along-with the other co-accused the following charge.

“That on 25/09/1986 at about 11:40 noon or thereabout you both the accused were having an intention to commit murder of witness, Goganbhai Rambhai Koli, resident of Bagasara near Gayatri Rewinding situated in Amrapara Area of Bagasara Village, Tal.Kunkavav-Vadia of District Amreli, and were also having an intention to give filthy abuses to him in public so as to breach public peace and tranquility and also were having an intention to commit breach of Notification dated 12/09/1986 issued by Additional District Collector, Amreli prohibiting keeping of arms / weapon. With a view to fulfill your aforesaid intention, you accused-Bhikhu Vasta inflicted blows with sword on witness Gogan Ram on his hand on left side behind the ear, on head, on left

shoulder, on right hand and also on other parts of the body and caused deadly injuries and thereby caused grievous hurt to him and thus attempted to commit his murder. That you accused-Devkubhai with a intention to murder / kill, witness, Gogan instigated accused No.1. By doing so you both the accused have committed an offence punishable under Section 307 read with Section 34 of the Indian Penal Code, and this Court has jurisdiction to try you accused for the aforesaid offences.

Further, on the same date, time and place you accused persons, with a view your fulfill their aforesaid motive, you both the accused have given filthy abuses to the witness, Goganbhai Rambhai, resulting into breach of public piece and tranquility and, by doing so you both the accused have committed an offence punishable under Section 504 read with Section 34 of the Indian Penal Code, and this Court has jurisdiction to try you accused for the aforesaid offences.

Further, on the same date, time and place you accused persons, with a view your fulfill their aforesaid motive, you both the accused, though Notification dated 12/09/1986 issued by the Additional District Magistrate, Amreli regarding prohibition to keep arms, you both the accused

possessed deadly weapon like sword and assaulted witness Gogan Ram. By doing so by you both the accused have committed an offence punishable under 135 of the Bombay Police Act and this Court has jurisdiction to try you accused for the aforesaid offences."

9. As mentioned earlier, the original accused No.2 has been acquitted and the present appellant-accused is not found guilty of the charge of offence punishable under Section 504 or the offence punishable under Section 135 of the Bombay Police Act. The appellant-original accused No.1 is also not found guilty of the charge of offence punishable under Section 307 but he has been held responsible for the offence punishable under Section 326 of the Indian Penal Code individually. It may be mentioned that acquittal of accused from the charge of offence punishable under Section 135 of the Bombay Police Act is on technical ground.

10. The present appeal is preferred under the provisions of Section 374 read with Section 386 of the Code of Criminal Procedure and therefore this Court can re-appreciate the entire evidence led

during the course of trial and record its own finding or by adopting the reasons assigned by the trial Court and the judgment under challenge can be upheld. It is also within the domain of this Court to reverse or to alter the findings on account of infirmities and errors but the Court obviously shall have to state the nature of infirmities / errors and their ultimate impact on the legality and validity of the finding recorded. It should be a reasoned order.

11. It is submitted by Mr.Saiyed that the finding recorded by the learned trial Judge is erroneous and the same is based on improper and illegal appreciation of evidence. While developing the argument, Mr.Saiyed has taken this Court through the depositions of doctors as well as injuries certificates (Exh.19 and 23 respectively) issued by both the doctors. It is submitted that if the evidence of both the doctors are considered, the appellant-accused could not have been linked with the crime for the offence punishable under Section 326 of the Indian Penal Code because to bring home the charge of offence punishable under Section 326 of the Indian Penal Code, the prosecution is supposed to prove that the accused was responsible in inflicting

the grievous hurt defined under Section 320 of the Indian Penal Code. Mr.Saiyed has taken me through the relevant Sections 320 and 326 of the Indian Penal Code. According to him, the use of word 'serious' would not make any injury grave or grievous hurt within the meaning of Section 320 of the Indian Penal Code. It is further submitted that Dr.Yasmin Kaba has accepted that the patient was referred to orthopedic division and x-rays were taken but no fractures were detected and injuries were simple in nature. There is controversy even as to the use of sword and inconsistency found in the evidence of both the doctors on the contrary rules out the possibility of use of muddamal sword in the assault. The medical evidence also gives impression that one hard and blunt substance must have been used and was used or the assault must be more than one and in such a fact situation, the trial Court ought not to have held that prosecution has proved its basic case beyond reasonable doubt. Where there is a scope of involvement of other persons in the event then why the theory placed by the accused during the course of cross-examination of witnesses including the injured and his brother should not be believed, is a question posed by Mr.Saiyed. The theory of defence is that

injured was playing carom with his friends on the public street encroached upon which had only 20' width and 6' land was grabbed by the people who are playing carom including the victim. In the morning time between 10:30 or 11:30 normally one would not play carom that too on a public street. It is suggested to the injured that they were staring to the female members of the society who were passing through that area after fetching water from the hand-pump which was located just near to the place where the incident had occurred.

12. It is also argued that when the complainant is not believed qua the involvement of accused No.2 in the crime then why the version of the complainant should be believed i.e. qua the involvement of the accused No.1, present appellant. According to learned Counsel for the appellant, this is a clear case of false implication and that too on account of grudge that complainant had developed in his mind on account of incident that had occurred prior to two months from the date of incident and for that Mr.Saiyed has taken me through the evidence which is at page No.28 of the paper-book. The person who can be said to be an independent and according to prosecution was a

person at the spot having supported the case of prosecution, it would be risky to accept the bare words of the injured in such or similar cases. It was possible for the trial Court to record the statement of the members residing in the very area. No carom board and other relevant material was found at the time of drawing Panchnama and obviously therefore the Police had not seized or recovered such articles. The muddamal sword is recovered by the Investigating Officer after lapse of several days under a pretext of a discovery Panchnama. The learned trial Judge has grossly erred in accepting the evidence of prosecution that the very muddamal sword was used in the incident and the accused is the person who was holding the muddamal sword and had assaulted the injured with the very sword. The evidence of F.S.L., ought not to have been given any weightage when the discovery of the muddamal weapon is found doubtful.

13. One of the point advanced by Mr.Saiyed is that complainant is also not sure that from which direction the assailant had approached him and had given blow. At one place he had told that the assailant had come from back side and had given three to four blows (page 30 of the paper-book) and in the

very evidence has stated that assailants had come from the opposite direction, i.e., from the western side of the place where the injured was sitting and both of them had come and some conversation had taken place between them prior to assault (page 28 of the paper-book). These two contrary stories placed by injured victim makes the prosecution case doubtful. One more infirmity in the evidence of the prosecution is that the very injured person had an opportunity to disclose the name of the assailant at the earliest when he was being treated by a doctor at Bagasara Hospital and at that time he was approached by P.S.I., Mr.Nandasana. Mr.Nandasana has stated that he had approached the injured when he was being treated but according to Mr.Nandasana injured was not able to state anything in detail and therefore he recorded the complaint of complainant. According to Dr.Kamalia, the injured was conscious and he never become unconscious and therefore the belated discloser of the name of the assailant by the injured should be viewed with doubt. When the body of the injured person was firstly examined by Dr.Kamalia, he found ten injuries, however when he was taken to District Head Quarter, i.e. Government Hospital, Amreli, Dr.Yasmin Kaba had noticed eighteen injuries.

The prosecution ought to have resolved this confusion as to why the other injuries were not noticed by Dr.Kamalia. Mr.Saiyed has averred that it appears that the prosecution was intending to put up a curtain on certain injuries that could have been caused by hard and blunt substance and as the story was placed before the Police that both the accused were armed with a sharp cutting weapon viz., sword and knife, the prosecution was supposed to explain as to how number of injuries were found on the body of the injured which could have been caused by hard and blunt substance. The prosecution has not successfully answered this fact situation. According to Mr.Saiyed when complainant has specifically stated that he has not lodged the complaint then his version should not be believed by this Court and it should be observed that somebody else has given a complaint with ulterior motive to implicate the accused in such a serious offence. It is also argued that the learned trial Judge has erred in considering the dying declaration and deposition of Mamlatdar. The Mamlatdar was not supposed to examine at all. As per the settled legal position, the Mamlatdar cannot prove the statement of a living person, as the injured was survived. The dying declaration cannot

be termed as dying declaration within the meaning of Section 32 of the Evidence Act, so it appears that the learned trial Judge was under the influence of the facts stated by the Executive Magistrate examined during the course of trial to prove the dying declaration recorded.

14. Mr.Bhate, learned A.P.P., while resisting the submissions made by Mr.Saiyed has argued that the finding of guilty recorded by the learned trial Judge is based on sound reasons and there is no perversity or illegality in appreciating the evidence led by prosecution witnesses. The trial Judge was supposed to consider the quality of the evidence led by prosecution and if certain witnesses have not supported the case of prosecution, the learned trial Judge can ignore that part of the evidence. The duty of the learned trial Judge was to separate chaff from the grain and that exercise has been done in the present case by the learned trial Judge by accepting the version of the injured witness and also his brother, who reached to the spot in couple of minutes. The presence of complainant at the spot of incident is found established by the conduct of that very witness. How could the complainant be there in

the Hospital at Bagasara during odd hours. Normally, in time between 12:30 or 1:00 either one would be at working place or at a lunch table not in the Hospital unless some close relatives is admitted in the hospital for treatment. There was no reason for the trial Court to discard the evidence of P.S.I., Shri Nandasana that he had recorded the complaint of Prosecution Witness No.1 (complainant) at Bagasara Hospital because the signature of the complainant is not under a serious dispute and then version of the injured witness could have been accepted that complainant was one of the persons who had taken the injured to the hospital. According to Mr.Bhate, normally a person present, injured can be taken to hospital for treatment in such a situation. The injured had reached to the hospital without Police Yadi. The hospital case papers indicate that injured was brought by the persons who were relatives of the injured, so, this endorsement made by the Doctor makes the version of the injured genuine and reliable that he was taken to hospital by the persons who were playing carom with him on the street. It is true that normally people would not play a carom board game between 10:30 and 11:30 in the morning. But the human conduct is found strange on number of occasions

and the complainant has specifically stated that why he was playing carom on odd hours. It is very likely that he may have reached to the spot but met with a challenge given by the accused after lapse of about two months. Because according to the complainant he was asked not to enter into particular area of town Bagasara known as Amrapara. According to Mr.Bhate, non-seizure of carom board would not make the incident doubtful because the Panchnama of the scene of occurrence is proved by Panch Witness and P.S.I., Shri Nandasana which is sufficient evidence to reach to a conclusion that the incident had occurred at a particular place mentioned in the Panchnama of the scene of offence. No incriminating article viz., weapon was lying at the spot. However, one circumstantial evidence was positively there i.e., blood of the injured. The F.S.L. Report clearly reveals that the earth collected from the place of incident is found with blood of group 'A'. The blood on the clothe of the injured is also of group 'A'. None of the doctors were suggested a question by the defence Counsel that the blood group of the injured was not of group 'A'. There was nothing on record to show that hospital authority had ever analyzed the blood group of the injured.

15. There is enough force in argument of learned A.P.P., that if the resident of the area of Amarapara had objection against playing of carom board game, that was being played on the very day and time and they were annoyed with the activity of the male members sitting at the corner of the street because women of the area were passing through that corner after fetching water from hand pump, then they would have assaulted everybody who were playing carom board game and not only the injured witness. As such there is no reference of hand pump in the Panchnama. Of course, it is not in evidence that what was the population of Bagasara at relevant point of time but a street having width of about 20' cannot be said to be abnormally small entry portion. If the area of 6' was encroached upon by the members who were playing carom then also there would be about 14' of gap and a small vehicle can also pass through that area. A bullockcart or handcart can also pass through that gap. Nobody made a complaint either against the injured or any other members who were playing on the street. It is the experience of the society that number of persons in the society practically are killing their time for want of gainful employment or

for any other reasons best known to them. As per evidence it was the first day of the injured to go into Amrapara area. So, according to Mr.Bhate, the incident itself corroborates the story placed by injured that he would not enter into Amarapara area on account of quarrel that had taken place before two months at a 'Pan Shop' run by the injured. Therefore, the learned trial Judge cannot be said to have committed grave error in accepting the version of the injured witness. On the contrary, the settled legal position is that if the Court is able to listen the ring of truth from any single witness, the accused can be linked with the crime. There are no material contradictions nor conflict in the evidence as such in the said evidence produced by prosecution.

16. There is also some force in argument of Mr.Bhate that bare words of the doctor would not help the defence side whereby the Dr.Kamalia has stated that patient was conscious. Consciousness from the medical point of view is materially different qua the mental fitness and the state of mind and P.S.I. Mr.Nandasana has rightly stated that injured was being treated, it was not possible for him to record his complaint. According to prosecution, Prosecution

Witness No.1, Balabhai was competent to unfold the story as to how and why the incident had occurred. The motive pleaded by prosecution has been proved by the injured witness substantially when the evidence of the injured witness is found corroborated by the medical evidence and then there was no reason for the Court to disbelieve this injured witness. According to Mr.Bhate, the reliance placed by the other side on the decision of Satguru Singh v. State of Punjab, reported in 1995 Cri.L.J. SC 4165 would not apply to the facts of the present case. According to Mr.Bhate practically preliminary treatment was given to injured at Bagasara Hospital. It appears that only bleeding wound were stitched so that patient may not loss more blood and thereafter he was immediately shifted for better treatment to the hospital at District Head Quarter, Amreli. If the injuries were normal in nature then there was no reason for Dr.Yasmin Kaba to refer the patient to Ahmedabad Civil Hospital. It is true that no Medical Officers were called by the Investigating Officer from the Ahmedabad Civil Hospital or V.S.Hospital but the facts stated by Dr.Yasmin Kaba has remained unchallenged that the patient was referred to

Ahmedabad for further treatment. Number of injuries found by the doctor, who examined the injured at Amreli, were more and while appreciating the medical evidence, the Court should compare the injuries. The description of the injuries is mentioned in the certificate issued by Dr.Kamalia and Dr.Yasmin Kaba. Ten injuries were noticed in the certificate issued by Dr.Yasmin Kaba, who initially examined the patient and the injuries which were noticed by Dr.Kaba which is not there in the injury certificate initially are in the area which may not have been seen or examined in detail by Dr.Kamalia. They were mostly contused lacerated wounds. It appears that Dr.Kaba has mentioned all injuries in detail.

17. According to Mr.Bhate reading of medical evidence gives clear impression that the sword having some portion with sharp edge and rest of portion without edge was used at the time of assault. Some portion of the sword was practically blunt and doctor has opined that if the blows are given indiscriminately then the contused lacerated injuries can be caused. For short, according to Mr.Bhate this Court without entering into the detailed discussion should dismiss the appeal adopting the reasons

assigned by the learned trial Judge for holding the accused guilty of the charge of offence punishable under Section 326 of the Indian Penal Code.

18. To appreciate the rival side contentions, the Court is inclined to mention the injuries that were noticed by Dr.Kamalia when the injured was taken to Bagasara Hospital.

1. Incised wound - left pari

Cheek regim size 7" x 3" x 1" cutting

Pinna ear left, cheek muscles ant and temporal muscle postly.

2. Incised wound left shoulder joint cutting deltoid muscle size 5"x 3" x 1'.

3. Left palm, incised wound going from inner to outer surface 2" x 1" x 0.5".

4. Right palm incised wound, cutting little finger proximal digit and right ring finger proximal digit, flaps of both fingers attached with skin posteriously.

5. Incised wound scalp - anterior - posterior in middle size 5" x 1"x bone deep.

6. Incised wound parallel to No.5 on Right side size 4" x 1" x bone deep.

7. Right axillary part - Incised wound size 3" x 0.5" x 0.5"

8. Incised wound right hand upper 1/3 size 1.5" x 1" x 0.5".

9. Incised wound, middle 1/3 right side hand outer side size 2" x 1" x bone deep.

10. Right knee joint incised wound size 1" x 0.5" x 0.5"
Cause due to sharp cutting inst. Duration of injury - Recent one.

19. The above injuries are proved by Dr.Kamalia in his cross-examination at length. Certain suggestions were made to him in the background of the certificate issued by Dr.Yasmin Kaba and Dr.Yasmin Kaba in her cross-examination has specifically stated during the course of re-examination made by learned A.P.P., that front portion of muddamal sword is more thin and sharp edge. Of course, this opinion is based on comparison of both the sides of sword but is also clear that the muddamal weapon was shown to the doctor and after seeing the sword in the open Court, the doctor opined that one part is comparatively thin and sharp edged. Dr.Kamalia has accepted the proposition during the course of cross-examination that there may be irregular shape wound, if the blows were given by the muddamal sword. This is the answer of the argument advanced by Mr.Saiyed that how

contused lacerated wound is found on the body of the person of the injured. Similar opinion is given by Dr.Yasmin Kaba whereby she has stated that injury Nos.15 to 18 can be caused by the blunt portion (reverse side) of the weapon. So, according to me the version of both the doctors are consistent to each other and not in conflict with each other. As such there is no cross-examination qua the first nine injuries that were noticed by Dr.Yasmin Kaba when the patient was taken to Civil Hospital, Amreli. It is not necessary to comment upon the gravity of the injury including the part selected while giving blows by the accused because the same is reflected in the certificate itself. The above description of injuries clearly reveals that three of the total injuries were very grave and caused on sensitive and vital part of the body. The injured witness has stated that he had gone to Ahmedabad for plastic surgery of the cut wound that was caused on one of the ears.

20. True it is that no fracture was noticed by the doctor in the x-ray taken. The question would be that, if the injuries were simple in nature then why the patient shifted to Ahmedabad. The Court should look to the length and depth of the injury. Here, it

would be beneficial to quote the Reference Note tendered vide Exh.22 where one doctor addresses the other in following manner and language.

"Patient is assaulted with sharp instrument and sustained multiple injury head, Right middle arm, Right ring and little finger, Left shoulder joint Right axillary, and as the patient has lost good amount of blood, Right hand palm, middle arm and left palm requires to be repaired after resuscitation."

21. The injured witness has accepted that he was able to move in the house after about 15 days from the date of incident but he has denied the suggestion that doctor had permitted him to move and his moments were free and normal with two grave injuries one on the leg and another on the face near ear, can be said to be serious injuries caused by sharp edged part of the muddamal sword. This muddamal sword has been recovered by Police within 24 hours of the arrest of the accused. It is true that the sword was found from a dry river bank but the Court should not give weightage to the Panchnama as a genuine discovery Panchnama. It appears to be a recovery Panchnama. Because when the prosecution does not rely only on evidence of the discovery Panchnama to link the accused with the crime nor insist on relying on

Panchnama as an important circumstantial evidence in favour of the prosecution, then, it was open for the learned trial Court to consider the Panchnama as recovery Panchnama, instead of discovery Panchnama. There is no doubt that the weapon has been recovered at the instance of the accused or on the clue given by the accused. After certain days when the weapon was recovered by the Police through the investigation the patient was taking treatment in the Hospital, so, it was not possible for the Police to create evidence against the accused because immediately after seizure of the sword, it was sealed and sent to F.S.L. and F.S.L. has found that muddamal sword is stained with human blood and human blood is of Group 'A' i.e., blood group of the injured. When injured himself has identified the weapon and when the doctor has opined that the injury on the body of a person can be caused by this weapon and that weapon is found with the blood mark of group 'A' which is the blood group of the injured then the Court should not view the recovery of the weapon as doubtful or otherwise vulnerable piece of evidence.

22. It is rightly argued by Mr.Bhate that the defence theory is not acceptable at all because there

is no suggestion that the injured himself was the only person playing carom or looking with ogling eyes to the female members of the society who were passing through public street, so why only the injured was selected by the persons residing in the neighbouring area. It is true that accused is entitled to throw shadow of doubt and is not under legal obligation to disprove the case of prosecution but if an irrational or unconvincing theory is placed by the accused then the Court can positively consider the defence theory at the time of evaluating the evidence led by prosecution.

23. This is a case of F.I.R., given to Police in couple of minutes of the incident occurred. It is stated by P.S.I., Shri Nandasana that he was about to leave town Bagasara for his other work, at that time he got information about the incident and therefore he rushed to the hospital directly. Obviously therefore, there may not be any station diary entry in the Bagasara Police Station. After recording the complaint, Bagasara Police Station was able to register the offence at about 12:30. The complaint did disclose the name of the two persons as assailants but as the evidence qua original accused

No.2 was comparatively weak, and length and width of the injury that was found on the body of the injured which was much longer than can be caused by knife, he has been given benefit of doubt. Even, injured has not stated before the Court that accused No.2 had inflicted knife blow on him and on a particular part of the body. The person who had threatened the complainant before two months was not the original accused No.2. It is the case of prosecution that at that time both the accused persons were at Pan Shop of the injured witness and on demand of money, accused No.1 had expressed his displeasure and annoyance and thereafter accused No.1 had threatened injured not to enter into the Amrapara area. It is in evidence that the Pan Shop of the injured is at a distance of about 500 feet, meaning thereby, it must be around more than 150 yards but when it is in evidence that the Pan Shop is not at a feasible distance from the spot of the incident, so it is very likely that in small town of Bagasara, a distance of about 150 meters may be known as some other area than Amrapara. But one fact has gone unchallenged which was stated by the injured that on the day of incident he entered into the Amrapara area i.e., after the incident that had occurred before two months at the

Pan Shop of the injured witness. This fact situation positively helps the facts and circumstances placed by prosecution and narrated by the complainant in his complaint. Prosecution Witness No.3, Shambhubhai Rambhai, examined at Exh.10 who is brother of the injured. Undisputedly, this witness has not claimed that he was an eye-witness to the incident. On receipt of the information as to the assault made on his brother-Gogan, he reached to the hospital. However, he has proved the presence of Balabhai and Jalabhai in the hospital. He has stated that Gogan was not conscious. He also came to know that his brother was brought at Amreli Hospital in a motorcar and Jalabhai and Balabhai had accompanied them. In cross-examination of this witness, it has come on record that he had given his statement on the strength of the facts narrated to him by injured Gogan and not on the strength of the facts stated by complainant-Balabhai. The contradictions of hostile witness is proved during the examination of P.S.I., Mr.Nandasana which would render the version of this witness useless.

24. According to me the above described injury mentioned in both the medical certificates and the

version of Dr.Kamalia whereby he has denied the suggestion that except injury Nos.1, 5 and 6, other injuries were simple, is sufficient for this Court to reach to a conclusion that the injury mentioned at Sr.No.1 in the deposition of Dr.Kamalia and described injury No.2 in the medical certificate and also the injury described at Sr.No.1 (in the certificate Exh.23) which is at Sr.No.2 in the deposition of Dr.Kamalia, were grave in nature. In the same way, the injury described by Dr.Kamalia at Sr.No.4 in the certificate (Exh.19) is also an injury grave in nature and it will be difficult for this Court to accept the submission of Mr.Saiyed that patient had become normal within 21 days from the date of injury and was capable to live his normal life. These three injuries would positively fall in the definition of grievous hurt enumerated in Section 320 of the Indian Penal Code in special reference of description Eighthly. In the same way, the cut wound on ear would also disturb the face and therefore only the injured as stated that he was asked to go for plastic surgery for the injury that had sustained on left side ear. This injury on ear would fall in the definition of grievous hurt described in the description sixthly.

25. In view of the above, the Court is not in agreement with the submission made by Mr.Saiyed that the prosecution has not proved that the accused had inflicted any injury which can be said to be grievous hurt defined in Section 320 of the Indian Penal Code.

26. There is no question of mistaken identity because it has come on record that before the blow given by the accused to the injured, some conversation had taken place between the accused and injured in reference to the prohibitory caution given to the injured before two months about his entry in the Amrapara area and more than one person had seen the appellant-accused assaulting the injured. Of course, they have not supported the case of prosecution but the contradictions were proved by prosecution through the evidence of P.S.I., Shri Nandasana which can positively help the injured at the time of evaluating his evidence and the Court can consider such evidence as relevant while accepting the say of the complainant as truthful.

27. The Court expresses its agreement with the submission made by learned A.P.P., that this is a

case where the injured-complainant should be believed and has been rightly believed. This is a case of injured eye-witness whose evidence has been corroborated by medical evidence and other circumstantial evidence including the conduct of the accused vis-a-vis the evidence qua motive to the crime.

28. For the foregoing reasons and the reasons assigned by the learned trial Judge, the Court is of the view that there is no merit in the appeal.

29. The alternative argument advanced by Mr.Saiyed is that this Court should reduce the quantum of punishment imposed by the learned trial Judge to some extent because now the accused shall have to go to prison after lapse of about 17 years.

30. The accused is held responsible for inflicting eighteen injuries on the body of a person. The accused could have been held guilty of the charge of offence punishable under Section 307 of the Indian Penal Code but no acquittal appeal is preferred so far as offence punishable under Section 307 of the Indian Penal Code and therefore this Court is

supposed to evaluate the judgment pausing a question that whether the conviction recorded by the learned trial Judge qua the offence punishable under Section 326 of the Indian Penal Code is sustainable in the eye of law. Ultimately, the imposition of punishment is discretionary. According to me, one year rigorous imprisonment in default of making payment of fine is found too harsh. In the same way, as the blows were given with a great force and none of the bone was fractured.

31. Having considered the submissions made by Mr.Saiyed, learned Counsel for the appellant, the present Criminal Appeal is partly allowed.

32. The judgment and order of conviction, sentence and quantum of fine passed by the learned Additional Sessions Judge, Amreli, in Sessions Case No.1 of 1987, on 13th January, 1992 is hereby confirmed, so far as offence punishable under Section 326 of the Indian Penal Code. However, the sentence imposed by the learned trial Judge in default of making payment of amount of fine is reduced to rigorous imprisonment of three months, instead of one year rigorous imprisonment.

33. The appellant-accused was on bail pending trial and at present also the appellant-accused is enjoying bail in view of the order passed by this Court on 20/01/1992 and therefore the appellant-accused should be given some reasonable time to surrender. The appellant-accused, therefore, is directed to surrender himself before the concerned trial Court on 14/08/2007 to serve out the sentence, failing which the trial Court shall issue non-bailable Warrant to secure the presence of applicant-accused so that he can be sent to Jail to serve the sentence. Bail Bond of the appellant-accused stand discharged/cancelled on surrender. Order and Direction accordingly.

(C.K.BUCH, J.)

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